BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 93-144
Commission's Rules to Facilitate	)	RM-8117, RM-8030
Future Development of SMR Systems	)	RM-8020
in the 800 MHz Frequency Band	)	
and		
Implementation of Section 309(j)	)	
of the Communications Act -	)	PP Docket No. 93-253
Competitive Bidding 800 MHz SMR	)	

To: The Commission

REPLY COMMENTS OF THE SOUTHERN COMPANY

Respectfully submitted,

THE SOUTHERN COMPANY

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EXECUTIVE SUMMARY

The Southern Company continues to believe that the proposals for MTA licensing set forth in this proceeding are misguided. The divergent views expressed in the Comments, even among the large SMR players who support the Commission's overall concept, are an indication that the SMR industry has serious reservations about the proposed licensing plan. The record indicates that (1) there is very little if any spectrum for MTA licensing, (2) no real auction for MTA licenses could occur because so much of the spectrum in question is held by one company, Nextel, and (3) the Commission lacks the legal authority to auction "marketing rights" as opposed to spectrum. These facts and the lack of consensus among the SMR industry mandates that the Commission continue licensing 800 MHz SMR spectrum under the current licensing rules.

Many parties agreed that the type of regulatory parity that Nextel seeks cannot be achieved, even with the proposals advanced in the FNPRM, because it would require disruption of an entire industry. Furthermore, Congress did not mandate that the regulatory parity be achieved at any cost. Because of the state of the SMR industry, MTA licensing is highly impractical and unnecessary.

Southern believes that certain key aspects of Nextel's Comments are beyond the scope of this proceeding as they propose to reallocate 800 MHz spectrum not contemplated as a proposal in this proceeding. Parties have not had adequate notice that spectrum they currently use and are eligible for could be reallocated. For this reason, the Commission cannot consider Nextel's plan to create a "new SMR block" without further notice as required by the Administrative Procedure Act.

Additionally, Southern believes that Nextel's new proposals are anticompetitive as they foreclose every opportunity for existing SMR licensees, both small and large alike, to continue operating, growing and succeeding in this business. In addition, Nextel boldly advances auction rules which will result in it being the only MTA bidder in town.

In light of the lack of consensus among the commenters in this proceeding, Southern remains even more convinced that Commission should abandon this proceeding and continue licensing 800 MHz SMR systems under the current regulatory procedures which already allow wide-area SMR licensing.

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To: The Commission

REPLY COMMENTS OF THE SOUTHERN COMPANY

The Southern Company ("Southern"), by its attorneys and pursuant to Section 1.415 of the Federal Communications Commission's rules, hereby replies to the Comments filed in response to the Further Notice of Proposed Rule Making ("FNPRM") in the above-captioned proceeding.[1/]

1/ In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band and Implementation of Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR, PR Docket 93-144 and PP Docket 93-253, Further Notice of Proposed Rule Making, adopted October 20, 1994, 59 Fed. Reg 60111 (November 22, 1994), Order extending the Comment Date to January 5, 1995 and Reply Comments to January 20, 1995, adopted November 28, 1994, Order further extending the Reply Comment Date to March 1, 1995, adopted January 18, 1995.

REPLY COMMENTS

I. LICENSING CONTIGUOUS BLOCK OF SPECTRUM IS AN UNWORKABLE ATTEMPT TO IMPLEMENT REGULATORY PARITY AND EXCEEDS THE COMMISSION'S STATUTORY AUTHORITY

A. Congress Did Not Mandate Regulatory Parity at Any Cost

1. Nextel seems to think that regulatory parity, at all costs, is the only goal that must be satisfied when licensing 800 MHz Specialized Mobile Radio ("SMR") spectrum.[2/] To the contrary, regulatory parity has its restrictions: necessity and practicality. The Commission must not promulgate a set of regulations that totally disrupts the SMR industry to the detriment of the public that is served by this industry. The proposals put forth by the Commission and Nextel are very impractical, and in Southern's view, unnecessary. The Commission's underlying "public interest, convenience and necessity" standard is the applicable and overriding goal.[3/]

2. Congress has clearly mandated some level of regulatory parity in the Commercial Mobile Radio Service ("CMRS") legislative scheme. The measures proposed by the

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[2/] Comments of Nextel at 16-22.

[3/] 47 U.S.C. § 303.

Commission in the FNPRM and in Nextel's Comments, however, would go well beyond that which Congress contemplated in passing the Omnibus Budget Reconciliation Act of 1993 ("Budget Act")[4/] as it relates to the telecommunications industry. These measures, if implemented, would not only exceed the Congressional mandate, but would have the effect of hindering or defeating the policy goals that Congress envisioned in creating the CMRS framework.

3. Section 6002(d)(3) of the Budget Act enables the promulgation of regulations to implement the Budget Act's amendments to the Communications Act. With respect to the regulations applicable to CMRS entities that were previously private land mobile services, that section provides, in relevant part:

> [The Commission] shall make such other modifications or terminations as may be necessary and practical to assure that licensees in such service are subjected to the technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services;[5/]

[4/] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI (1993).

[5/] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(d)(3), 107 Stat. 312, 397 (1993) (emphasis added).

Neither the Commission's proposal to auction large, heavily occupied contiguous blocks of spectrum, nor Nextel's proposed mandatory relocation of licensees occupying those blocks, is 'necessary' or 'practical'. The implementation of this plan, as envisioned by Nextel in its Comments, would take the policy of regulatory parity to absurd lengths, creating tremendous disruption and harm to large numbers of incumbent SMR licensees in exchange for only the possibility of benefit to a limited few applicants. Ironically, the only "regulatory parity" achieved is for Nextel, while the rest of the SMR industry is left on a distinctly unequal playing field. Such an outcome is not consistent with Congressional intent nor is it in the public interest.

B. This Version of Parity With Cellular and PCS Harms All Other 800 MHz Licensees, Except Nextel

4. In concept, Nextel's proposal creates the possibility of enhanced competition in the marketplace as between the holder of one or more Major Trading Area ("MTA") spectrum blocks and cellular or Personal Communications Service ("PCS") services. The cost to the SMR market to reach that goal, however, outweighs the possible, incidental gain to competition in the CMRS market as a whole. Under the FNPRM proposal, an applicant can conceivably obtain the

full 200 channels of a given MTA, force the incumbent licensees out at its complete discretion, and enjoy a protected, privileged status vis-a-vis the rest of the SMR industry.

5. Southern submits that nowhere in the text or spirit of the Budget Act is there any basis for this elaborate, one-company oriented scheme. Although proposed with the stated objective of creating a milieu of regulatory parity, this system would, ironically, cause extraordinary harm to the competitive process, and to the current competitors, within the existing SMR service market. The effect of implementing the FNPRM with Nextel's additional proposal would be to artificially advance the interests of one, "spectrum rich" applicant at the expense of the many existing licensees. The result will be an overall net loss to the interest of competition which Congress set out to foster with the passage of the CMRS framework.

6. The Commission cannot deny that its proposal overwhelmingly favors Nextel to the detriment of all other SMRs. Many other commenters made note of this point.[6/]

[6/] Comments of Thomas Luczak at 5, Parkinson Electronics Company, Inc. et. al. at 7, Supreme Radio Communications, Inc. at 4-5 and SMR WON and Southern passim.

The Commission has an overriding duty to assure that its rules promote competition -- the true essence of regulatory parity. Accordingly, the Commission must preserve competition, and not protect any one competitor. To adopt the FNPRM as proposed benefits a single SMR competitor, violating longstanding antitrust principles.

7. Congress has determined that regulatory parity is a goal to be pursued; there are, however, limits to the measures which the Commission can employ to achieve it, i.e., necessity and practicality. The Commission's proposals with respect to contiguous spectrum blocks and Nextel's proposals with respect to mandatory relocation of incumbents in these blocks could not be more drastic. Where the pursuit of regulatory parity dampens competition and disrupts or destroys competitors, as it would under these proposals, it defeats its own purpose.[7/] Congress clearly did not intend such a result.

[7/] Southern also seriously doubts whether the contiguous block of channels is necessary given the current state of digital technology.

II. THERE IS NO SMR INDUSTRY CONSENSUS REGARDING THE COMMISSION'S 800 MHZ SMR LICENSING PROPOSALS

8. A review of the Comments submitted by the scores of parties reveals that there is little consensus concerning the various policies and procedures which the Commission would have to implement to effectuate its proposed wide-area 800 MHz SMR licensing framework. For example, even parties that basically support the goals of the FNPRM, such as American Mobile Telecommunications Association ("AMTA"), note that major elements of the industry believe that the mandatory relocation aspects of the proposal are fundamentally unworkable, as there is no adequate way to compensate system operators and their end users for the true costs, both tangible and intangible, of relocation.[8/]

9. The inherent tensions in the Commission's proposals are illustrated by the fact that even a party such as Dial Call that supports the grant of a single, 10 MHz, MTA license, is opposed to the Commission's proposed voluntary/mandatory relocation model.[9/] As detailed below, these inconsistencies, which Nextel's proposed framework would only serve to exacerbate, doom the proposal. The U.S.

[8/] Comments AMTA at 17.

[9/] Comments of Dial Call at 6-7.

Small Business Administration ("SBA") aptly describes the FNPRM as a "grandiose scheme."[10/] Southern agrees and urges the Commission to abandon this effort to forcibly restructure what is basically a vibrant industry.

A. There is No Consensus That the FNPRM Can Be Implemented in Any Reasonable Fashion

10. Although the Commission initiated this proceeding in 1993 to consider licensing wide-area SMR system on a geographic basis, the proposals set forth in this proceeding are a different creature than the 1993 Notice of Proposed Rule Making. Indeed, the proposals are derived from the Comments of Nextel as filed in the CMRS rulemaking proceeding.[11/] Nextel has somehow persuaded the Commission that designating the upper 200 SMR channels for wide-area licensing while simultaneously displacing existing SMR operations to other channels would be in the public interest.

11. The Comments are clear. No one benefits from the proposals set forth in the FNPRM, except Nextel. Many parties described how such proposal, if adopted, would harm

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[10/] SBA at 30.

[11/] FNPRM at ¶ 11.

other 800 MHz SMR licensees. Even the large SMR players believe that the Commission's proposals are unworkable. For example, OneComm and CellCall, Inc. supported the concept of licensing the upper 10 MHz of SMR spectrum for wide-area systems, but believed that dividing these channels into four 2.5 MHz licenses is unworkable because it forces MTA licensees to coordinate with other MTA licensees and diminishes competition.[12/] Numerous small SMR operators explained the harm to them: (1) creates harmful interference, (2) disrupts existing service to the public, (3) forces non-SMR systems to migrate to lower frequency bands, (4) forecloses opportunity to expand existing operations, (5) drives small SMR operators out of business (anticompetitive) and (6) unfairly disadvantages small SMR operators in the auction process.[13/]

12. It is a well known fact that the 800 MHz spectrum, both SMR and non-SMR spectrum, is almost completely

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[12/] Comments of OneComm at 13-14 and Comments of CellCall at 12-13.

[13/] Comments of Marc Sobel at 1-2, Comments of American Petroleum Institute ("API) at 7, Comments of Anheuser-Busch Company at 4, Comments of Douglas Bradley and Dennis Hulford at 2-3, Comments of Brandon Communications, Inc. at 2, Comments of Chadmoore Communications, Inc. at 5-8, Comments of Don Clark Radio Communications, Inc. at 2, Comments of Communications Center, Inc. at 1-2, Comments of Kevin Lausman at 3 and Comments of Cumulous Communications Corporation at 11-12.

licensed. Southern supplied the Commission with convincing exhibits evidencing this fact. Many parties echoed Southern's position on this point. For example, Genesee Business Radio Systems, Inc. points out that the top 175 U.S. cities do not have 800 MHz SMR spectrum available for new systems.[14/] Pro Tec Mobile Communications, Inc. also noted that there is no spectrum available for growth of traditional SMR systems.[15/] SMR WON argued not only is there insufficient spectrum to carry out the MTA licensing approach, but there is insufficient spectrum to conduct an auction or to facilitate relocation, whether mandatory or voluntary.[16/] Even Nextel concedes that there is insufficient spectrum to carry out the Commission's proposal.[17/] This is a crucial point because the Commission's proposal cannot succeed with the potential for harm to thousands of existing SMR licensees.

14/ Comments of Genesee Business Radio System, Inc. at 2.

15/ Comments of Pro Tec Mobile Communications, Inc. at 2.

16/ Comments of SMR WON at 36-46.

17/ Comments of Nextel at 7-8, 13, 31, 52 and 56. "The driving force behind the creation of wide-area SMRs in most congested markets is insufficient spectrum capacity; i.e., spectrum scarcity. Comments of Nextel at 7 (emphasis added).

13. Moreover, a substantial majority of the SMR spectrum is in the hands of Nextel. Both Southern and SMR WON convincingly documented how Nextel monopolized the vast majority of the spectrum in their service areas.[18/] Southern would not be surprised if other studies revealed the same pattern nationwide.

B. There Is No Industry Consensus on Licensing the Upper 200 SMR Channels on an MTA Basis

14. The FNPRM indicates the Commission's predisposition for licensing the contiguous upper 200 channels on an MTA basis, with the agency suggesting that it might intervene if incumbents refuse "reasonable" inducements to relocate. First, there is no consensus that the grant of contiguous spectrum is desirable or workable. Second, there is no consensus that Rand McNally's MTA is the appropriate geographic unit for wide-area licensing.

15. Several parties have argued that the Commission's emphasis on providing contiguous spectrum is ill-placed, primarily because such a course of action opens a Pandora's box of relocation issues.[19/] PCIA wisely notes that in

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[18/] Comments of Southern at 19-21, SMR WON at 29.

[19/] Comments of SMR WON at 20, 31; Comments of PCIA at 11-12.

border areas the Commission is precluded by treaty obligations from creating contiguous spectrum blocks in the 800 MHz band, and that, when analyzed, the sum total of such territory constitutes one-third of the United States.[20/]

16. While MTA licensing may be appropriate for the licensing of PCS[21/], there is certainly no consensus among the commenters that MTA licensing is appropriate for this already heavily employed 800 MHz SMR spectrum. Importantly, the parties being relocated for PCS operations were not the direct competitors of the parties benefiting from the reallocation, as would be the case here. As an alternative, PCIA supported the use of the longstanding Metropolitan Statistical Area ("MSA") framework modified as appropriate where MSAs may be too small to be true operational areas.[22/] Scores of commenters, including SMR WON, supported the use of the Commerce Department's Basic Economic Area, which constitutes a geographic unit mid-way

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[20/] Comments of PCIA at 12.

[21/] Southern reminds the Commission that PCS was authorized in the 2 GHz band after arduous allocation proceedings in Dockets 90-314 and 92-9. As we note elsewhere in these Reply Comments, the contiguous spectrum proposal together with the inevitable incumbent relocation issues, make it imperative that, if the Commission decides to proceed down this path, it recast this proceeding for what it really is -- a reallocation proceeding.

[22/] Comments of PCIA at 21.

in size between an MTA and a Basic Trading Area, and which may more closely track commuting patterns.[23/] Southern urges that the Commission refrain from adopting any alternative wide-area geographic unit definition without first soliciting full public notice and comment.

C. Contiguous SMR Channels Require Band Clearing and Forced Relocation of Existing Licensees

17. Logically, relicensing contiguous spectrum requires that existing operations cease, and the band be cleared to accommodate the new MTA licensee. As Nextel so plainly states, "mandatory retuning (relocation) will be necessary."[24/] It is abundantly and unmistakably clear that the only possible way to implement the Commission's proposal is to force some 30,000 existing 800 MHz SMR operators off the frequencies licensed to them. This will be no small undertaking, and the task is exacerbated in light of the processing of pending SMR applications, making even less spectrum available for relocation. Southern and SMR WON document that there is insufficient unused spectrum to create the 200 channel block in their market areas, and

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23/ Comments of SMR WON at 53.

24/ Comments of Nextel at 31.

only Nextel has sufficient spectrum warehoused to accommodate displaced licensees.

18. Moreover, there truly is no equitable way to achieve this mission without harming the existing licensees and the public which takes service from these companies. The Commission must recognize that forced relocation of over 30,000 licensees is not in the public interest.[25/] Such relocation is massive, and disrupts service to the public. None of these public interest factors should be overlooked by the Commission.

D. The Rights Conferred on MTA Licensees Undermine Current FCC Policy and Are Not in the Public Interest

19. Many of the rights conferred upon the MTA licensees already exist under FCC rules or are obtainable by waivers. SMR licensees have the authority to construct and move sites within a "wide-area system." SMR licensees also have the existing right to negotiate to acquire additional spectrum from other licensees. This has been Nextel's approach all along. Accordingly, there is no great benefit being bestowed upon the MTA licensees in this instance.

[25/] Other parties agreed. See Comments of Lagorio Communications at 15-18, and Comments of Thomas Luczak at 6-8.

20. Moreover, an MTA licensee's automatic ability to recover unconstructed or unused frequencies within the MTA undermines the FCC's Finder's Preference Policy.[26] This right must be mutual. In essence, the Finder's Preference program should allow existing SMR operators to gain additional channels when a MTA licensee fails to construct in a timely manner. Accordingly, Southern supports the Comments of Fresno Mobile Radio, Inc. which seeks to maintain the Finder's Preference Policy under a MTA licensing scheme.[27]

E. Existing SMR Licensees Should not be Unduly Restricted to Their Existing Authorizations

21. The FNPRM proposes to maintain co-channel interference protection for existing systems, but the Commission also proposes limiting the future growth of these systems by prohibiting expansion beyond current service areas unless consent is obtained from the MTA licensee.[28] Scores of commenters opposed the idea that existing SMR licensees would be precluded from modifying or moving

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[26] Comments of Southern at 15-16.

[27] Comments of Fresno Mobile Radio, Inc. at 7-8.

[28] FNPRM at ¶ 37.

existing sites.[29/] Any proposal that limits the expansion or growth of existing SMR systems is anticompetitive and not in the public interest. Like wide-area SMR hopefuls, existing SMR licensees deserve an opportunity to fully develop their systems and compete with other SMR operators.

22. Furthermore, the FCC cannot guarantee full co-channel protection of existing SMR systems operating within a MTA. With a dominant SMR player monopolizing an entire MTA, it is easy for an MTA licensee to "crowd out" local SMR operations within an MTA. This could be done by blatant co-channel interference, or by a frequency re-use plan that surrounds and suffocates the incumbent, severely limiting its operations.

23. Finally, existing extended implementation schedules cannot be rescinded. SMRs who filed, consistent with the FCC rules, and obtained authority to develop and construct their systems on an extended schedule have invested enormous resources with the understanding they would be able to construct in accordance with these schedules. There is no justification whatsoever for

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[29/] See e.g., Comments of Morris Communications, Inc. at 3, Nielson Communications, Inc. at 4, Pittencrieff Communications, Inc. at 11-12, SBA at 29, SMR Small Business Coalition at 14 and Total Com, Inc. at 8.

penalizing these licensees solely for one competitor's benefit. Southern supports DCL Associates, Inc. view that a retroactive reduction or elimination of previously granted extended implementation periods would shake the industry's confidence in the SMR service.[30/]

F. Proposed Coverage Requirements for MTA Licensees are Flawed

24. Several parties pointed out the flaw associated the FNPRM's coverage requirements for MTA licensees. Most notably, many existing licensees already meet the proposed coverage requirements for MTA license where they serve a metropolitan area. Therefore, a licensee could receive an MTA license and merely hold on to the spectrum for years without needing to construct and operate the newly acquired channels. Both AMTA and CellCall noted that coverage requirements for MTA licensees should be strengthened by being based on a geographic plan rather than solely on a population plan.[31/] Southern agrees the plan proposed under the FNPRM encourages spectrum underutilization and warehousing.

[30/] Comments of DCL Associates, Inc. at 2. This is equally true of Nextel's proposal to eliminate extended construction schedules.

[31/] Comments of AMTA at 15 and Comments of CellCall at 18.

III. THE COMMISSION LACKS AUTHORITY PURSUANT TO SECTION 309 OF THE COMMUNICATIONS ACT TO CONDUCT AUCTIONS OF HEAVILY OCCUPIED 800 MHZ SPECTRUM

25. Several commenters challenged the Commission's legal authority to hold auctions for 800 MHz SMR services.[32/] Scores of commenters opposed the Commission's proposal to auction off 800 MHz SMR spectrum.[33/] Southern supports these views. Southern urges that the Commission recall that the "rules of construction" laid down by the Congress in its grant of auction authority require that the agency continue to use "engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutual exclusivity in application and licensing proceedings."[34/] Southern does not believe that the Commission has the legal authority to conduct an auction under the circumstances where there really is not any "spectrum" to auction, but rather simply "marketing rights." Even entities that are closely affiliated with Nextel, such as Dial Call, oppose auctions, stating that auctions would exceed the authority that Congress has delegated to the

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32/ Comments of AMTA at 26, SMR Small Business Coalition at 8 and SMR WON at 4-8 and Exhibit B.

33/ Comments of Dial Call at 12, Pittencrieff at 5 and 8, SMR WON at 4-8, UTC at 7, CICS at 6, PCIA at 18, E.F. Johnson at 6 and CellCall at 25-26.

34/ 47 USC § 309(j)(6)(E). See also Comments of PCIA at 18.

Commission and would ignore the investments made by existing SMR licensees in reliance of the Commission's longstanding SMR regulatory structure.[35/]

26. The Commission's proposal to make available 800 MHz spectrum blocks for application and auction is not authorized by the Budget Act. Section 309(j)(1) provides the statutory authority for the auction mechanism; that section provides, in relevant part:

> If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), then the Commission shall have the authority, subject to paragraph (10), to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection.

The express language of § 309(j) confers authority to conduct auctions only upon the filing of exclusive applications for an initial license, and only for licenses involving use of the spectrum. The significance of the former requirement is made clear by the fact that, in tailoring § 309(j), Congress expressly excluded applications for renewal or modifications from the auction process.[36/]

[35/] Comments of Dial Call at 5.

[36/] Report of the Committee on the Budget, House of Representatives, 253 (1993).

Congress clearly chose not to expose every license to the possibility of predation by auction. The auction mechanism has no application or relevance to spectrum which is already occupied and licensed. The statute, by its plain language, only authorizes the use of the auction mechanism to license spectrum which, aside from the competing application[s], is otherwise available.

27. Of the scores of commenting parties in this proceeding that actually operate SMR systems, only one, Nextel, fully supports the Commission's auction scheme, provided the auction is conducted on Nextel's terms. As Chadmoore Communications, Inc. notes in its Comments, the vast number of operating SMRs that are not affiliated with Nextel would be financially unable to present Nextel with serious competition at any auction.[37/] Sadly, the Commission's auction proposal is tailored to meet the requirements of a single competitor, Nextel, rather than advance real competition in the SMR industry.[38/]

28. There appears to be general agreement among the participants to this proceeding that 800 MHz spectrum is at

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37/ Comments of CCI at 7-8.

38/ See, Comments of PCIA at 8.